Music Express East, Inc. *and* International Brotherhood of Teamsters Local 805, AFL–CIO. Case 22–CA–25174

November 28, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On May 14, 2003, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and to adopt the recommended Order as modified.

Contrary to the judge, we dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Emad Mercho. Unlike the judge, we find that the General Counsel failed to satisfy his burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 415 U.S. 989 (1982), approved in *Transportation Management, Inc. v. NLRB*, 462 U.S. 393 (1983), of establishing that the Respondent discharged Mercho because of his union activities. Specifically, we find that the General Counsel failed to establish that the Respondent's officer who decided to discharge Mercho, General Manager Badalamenti, knew that Mercho had engaged in union activities or supported the Union.

Here, there is no direct evidence that Badalamenti had knowledge of Mercho's union activities. In the absence of direct evidence, the Board examines all the circumstances to determine whether the employer's knowledge of the employee's union activities can be inferred. See *D&F Industries*, 339 NLRB No. 73 at 5 (2003); see also *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988). Upon consideration of all the circumstances here, we find that such an inference is not warranted.[2]

The evidence regarding Mercho's conduct during the union organizing drive fails to reveal overt signs of support for the Union. Indeed, Mercho's conduct arguably reflected just the opposite. Mercho was one of the first two drivers to volunteer for the Respondent's chauffeurs committee, which committee the Respondent proposed and created as a means of drawing support away from the Union. The Respondent—specifically Badalamenti—knew that Mercho supported the committee because Mercho signed a publicly displayed list of employees willing to stand for election to the committee.

Conversely, Mercho's conduct in support of the Union was extremely limited. He did not attend a single union meeting prior to his discharge. He did not solicit union authorization cards. Nor did he serve on the Union's organizing committee. His only acts in support of the Union were to sign a union authorization card—out of the view of any management official,[3] and to tell Training Manager Williams that he had done so.

Nor do we find that Mercho's comments to Williams warrant an inference that Badalamenti knew that Mercho supported the Union. Mercho testified that he informed fellow driver and low-level, part-time Supervisor Williams that he had signed a card. Mercho testified that Williams' response was to express support for the Union, or at least an intent to keep an open mind regarding the Union. Indeed, consistent with his response, Williams attempted to attend the Union's May 4 meeting for unit employees. In these particular circumstances, we are unwilling to infer that Williams would have informed Badalamenti that Mercho had signed a union card. See *Efficient Medical Transport*, 324 NLRB 553 fn. 1 (1997). Further, with one exception, there is no showing that Williams discussed union matters with Badalamenti. The record includes evidence of only one conversation between Williams and Badalamenti in which the Union was raised. In that conversation, Williams testified that he informed Badalamenti that he (Williams) had attempted to attend the May 4 union meeting. This conversation occurred several days *after* Badalamenti discharged Mercho.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Contrary to our dissenting colleague's assertion, the judge did not discredit Badalamenti's testimony that Williams did not tell him about Mercho's union activities. The judge imputed Williams' knowledge to Badalamenti, and he speculated that Williams had told Badalamenti about Mercho's activities.

[3] Mercho signed his union authorization card in a brief late night meeting with a member of the union organizing committee in the Respondent's parking lot. The judge specifically found that there is no evidence that the Respondent had observed this encounter.

Contrary to the assertion of our dissenting colleague, this conversation, after the discharge, is not the sole basis for our conclusion that Williams did not tell Badalamenti, before the discharge, of Mercho's union activities. Rather, we rely on the fact that there was only one conversation between Williams and Badalamenti regarding this matter and it occurred after the discharge.

Finally, the context and content of Badalamenti's conversation with Williams undercuts any inference that Williams would have shared his knowledge about Mercho's union support with Badalamenti. First, the judge specifically found that Williams did not inform Badalamenti ahead of time that he was going to attend the union meeting, thereby suggesting that he did not regularly consult Badalamenti about the Union. In the one conversation they had after the union meeting, the record does not show that Williams named *any* employees who he saw at the meeting or that Badalamenti made any such inquiries.[4] Thus, contrary to our dissenting colleague, there is ample affirmative evidence—beyond the context of Williams' conversation with Badalamenti—to support the inference that Williams did not inform Badalamenti of Mercho's union activities. Indeed, as discussed above, the content of the conversation is equally telling.

Our colleague asserts that there are only two exceptions to the "rule" that a supervisor's knowledge will be attributed to the employer. We do not agree that the Board cases finding exceptions to the aforesaid general rule represent the sum total of those circumstances under which a supervisor's knowledge will not be imputed to his employer. Having said that, one exception our colleague identifies occurs when the supervisor is a "promoter" of the union. We agree that it is unreasonable to infer that a supervisor "promoter" of the union would tell upper management of the union activity of other unionists. That is the essential holding in *Efficient Medical Transport*, 324 NLRB at 553 fn. 1, cited by our colleague. However, it is a classic non sequitur to hold that a "prounion" supervisor (somewhat less than a "promoter") would tell upper management of the union activity of other unionists while a promoter would not. Rather, absent evidence to the contrary, common sense suggests that the prounion person would similarly not tattle. See *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 685–687 (7th Cir. 2000). Thus, even if our dissenting colleague is correct that Williams was not a union promoter, but was only a union supporter, we still would find it inappropriate to impute Williams' knowledge of Mercho's union activities to Badalamenti.[5]

The other exception identified by our colleague applies here. For, as noted above, the evidence affirmatively supports the proposition that Williams did not pass on to Badalamenti the fact that Mercho was prounion.

In light of the lack of any direct evidence that Badalamenti knew of Mercho's union activities, we have examined the other circumstances of Mercho's discharge to determine whether they would support such an inference. We find that they would not. For example, the timing of Mercho's discharge is not so suspicious as to support an inference of Badalamenti's knowledge. Although Badalamenti did commit a violation of Section 8(a)(1) on the same day he informed Mercho of his discharge, the violation was not directed at Mercho, nor did it relate to conduct by him.[6] Further, Badalamenti testified that he had made the decision to discharge Mercho days earlier, when he learned that: Mercho had filed a false unemployment claim; Mercho had told a dispatcher that he had taken another job that could conflict with his driving responsibilities; and Mercho had had a heated dispute with a dispatcher in which he used abusive language. Under these circumstances, we find that the timing of Mercho's discharge is too weak a foundation upon which to base an inference regarding knowledge.

Nor do we find that the judge's findings regarding the Respondent's union animus support an inference of knowledge. The judge relied primarily on the Respondent's commission of other unfair labor practices to support his finding that the Respondent harbored animus against the Union. Although we adopt the judge's findings regarding those violations, we note that none of the violations were directed at Mercho, or involved threats of negative consequences resulting from employee support for the Union. Indeed, apart from the allegation regarding Mercho, there are no allegations or findings that the Respondent took any adverse actions against those employees who—actively or otherwise—supported the Union.

Accordingly, based on the foregoing, and the particular circumstances of this case, we find that an inference can-

[4] The judge speculated that, although the Respondent did not threaten or retaliate against any open union supporter, Badalamenti did so against Mercho because he was upset by Mercho's union support when he had previously supported the Respondent's Chauffeurs Committee. The judge concluded that Badalamenti "likely viewed Mercho as someone trying to 'play both sides of the fence.'" This conclusion has no record support. Thus, the record contains no evidence that Badalamenti expressed such a view to anyone about Mercho or any other employee.

[5] Our dissenting colleague disputes whether Williams expressed support for the Union. As discussed above, the record clearly shows that he did when he told Mercho that the Union was "a good idea."

[6] The Board has adopted the judge's finding that on May 1, Badalamenti created the impression that he was surveilling union activities when he told employee Richter that he knew the next union meeting was scheduled for May 4th.

not reasonably be drawn either that Williams told Badalamenti that Mercho supported the Union or that Badalamenti gained knowledge of Mercho's union activities from another source. In the absence of evidence of such knowledge, we find that the General Counsel did not meet his initial *Wright Line* burden. Accordingly, we dismiss the complaint insofar as it alleges that the Respondent discharged Mercho in violation of Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Music Express East, Inc., Elmwood Park, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

1. Delete paragraph 1(g) and reletter the subsequent paragraph.

2. Delete paragraphs 2(b)-(d) and reletter the subsequent paragraph.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., November 28, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

Reversing the administrative law judge, my colleagues dismiss the complaint allegation that the Respondent discriminatorily discharged employee Emad Mercho in violation of Section 8(a)(3) and (1) of the Act. Specifically, my colleagues conclude that the General Counsel failed to establish the Respondent's knowledge of Mercho's union activities. Contrary to my colleagues, I agree with the judge that the General Counsel presented "compelling evidence"—both direct and circumstantial—that the Respondent knew that Mercho was a union adherent.[1]

Direct Evidence of Knowledge

On April 23, 2002, during the course of the organizational campaign, Mercho signed a union authorization card.[2] The next day, as Mercho was coming into work, he encountered Supervisor Isaac Williams.[3] Mercho explained to Williams that the employees needed to support the Union to give them some power to address the problems caused by the Respondent. Mercho revealed that he had signed a card for the Union and asked Williams if he would be interested in signing one. Williams replied that the Union was a good idea, but that he wanted to think about it.

As the judge correctly recognized, information acquired by a supervisor with respect to the specific employees involved in a union campaign is ordinarily imputable to the employer as a matter of law. E.g., *Woodlands Health Center,* 325 NLRB 351, 361 (1998); *Ready Mix Concrete Co.*, 317 NLRB 1140, 1143–1144 (1995), enfd. 81 F.3d 1546, 1552 (10th Cir. 1996). There are two narrow exceptions to this general rule: (1) "when it has been affirmatively established as a matter of fact that a supervisor who learned of union activities did not pass on the information to others";[4] and (2) when a supervisor is "a promoter of the Union."[5]

Although Williams may be, as my colleagues contend, a "low-level, part-time supervisor," he nevertheless remains a supervisor within the meaning of the Act. His knowledge of Mercho's union activities is therefore imputable to the Respondent unless an exception applies.

With respect to the first exception, the record does not "affirmatively establish" a basis for not imputing Williams' knowledge to the Respondent. Significantly, the judge did not credit the relevant testimony of the Respondent's witnesses. Rather, the judge expressly discredited Williams' testimony on the knowledge issue,[6] and the judge implicitly discredited General Manager Richard Badalamenti's denial that he knew about Mercho's union activity.[7] Thus, this is not a case such as *Dr. Phillip Megdal*, supra, where the judge credited the testimony of the supervisors that their knowledge of an employee's union activities was not divulged to upper management. Here, the "affirmative" evidence relied on by the majority consists essentially of the fact that Williams had a conversation with Badalamenti about the Union after Mercho's discharge. Based on the fact that Williams *did* discuss the Union with Badalamenti *after* Mercho's discharge, the majority leaps to the conclusion that Williams did *not* discuss the Union with Badalamenti *before* Mercho's discharge. This is not a reasonable in-

[1] In all other respects, I agree with my colleagues' decision.

[2] All subsequent dates are in 2002.

[3] Williams worked part time as the training manager and part time as a driver. The Respondent admitted in its answer that Williams was a supervisor and an agent of the Respondent within the meaning of the Act.

[4] *Dr. Philip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983).

[5] *Efficient Medical Transport*, 324 NLRB 553 fn. 1 (1997).

[6] See fn. 7 of the judge's decision.

[7] See sec. III, A, (6), par. 3 of the judge's decision.

ference; it is sheer speculation falling far short of the required evidentiary showing.

My colleagues also attempt to shoehorn the facts of this case into the second exception, but the record, fairly considered as a whole, does not establish that Williams was a "promoter" of the Union. When Mercho solicited Williams to sign a card, he declined, stating that the Union was a good idea, but he needed to think about it. About 10 days later, Williams attempted to attend a union meeting.[8] These facts suggested to the judge, as they do to me, that while Williams "did have an interest in the Union," he "wished to find out more about" it. In other words, these facts simply do not add up to a supervisory "promoter" of the Union who would likely withhold from his employer information about the organizational campaign.[9] To the contrary, Williams admitted that he reported his own effort to attend the union meeting to General Manager Richard Badalamenti. Therefore, this case does not fall within the "union promoter" exception and Williams' knowledge of Mercho's prounion sympathies is properly attributable to the Respondent.

Apparently recognizing the weakness of their position, my colleagues attempt to expand this exception to encompass not only union "promoters," but also union "supporters." There are two flaws (one legal and one factual) with this effort.

First, it is not supported by Board law. Indeed, the case cited by the majority denied enforcement of a Board decision.

Second, as discussed above, the record shows that Williams wanted to think about the Union and learn more about it before signing an authorization card. That hardly qualifies him as a union supporter.

Circumstantial Evidence of Knowledge

As my colleagues acknowledge, even without direct evidence, "the element of knowledge may be shown by circumstantial evidence from which a reasonable inference may be drawn." *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988). "Such circumstances may include the employer's demonstrated knowledge of general union activities, the employer's demonstrated union animus, the timing of the discipline or discharge, and pretextual reasons for the discipline or discharge asserted by the employer." *D&F Industries, Inc.*, 339 NLRB No. 73, slip op. at 5 (2003). Disparate treatment is another relevant circumstance. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Here, all of these factors support the inference that the Respondent knew of Mercho's union activities.

(1) Knowledge of general union activities.

It is undisputed that the Respondent knew of the Union's organizational campaign. Indeed, as discussed more fully below, by the time of Mercho's discharge on May 1, the Respondent's unlawful response to that campaign was already well underway.

(2) Animus

There can be no doubt that the Respondent expressed strong animus toward the union activities of its employees:

- On April 18, within days of learning of the organizational campaign, the Respondent conducted a mandatory meeting at which it told employees that "outside sources would be catastrophic to the company and its employees."
- At the same April 18 meeting, the Respondent violated Section 8(a)(1) by soliciting grievances from employees with an implied promise to resolve them.
- At a subsequent meeting on April 24, the Respondent violated Section 8(a)(1) by promising and granting benefits to employees in order to discourage them from supporting the Union. The Respondent stated that it did not understand why the employees still wanted a union since the Respondent was following up on last week's meeting and had some results for the employees.
- On May 1, the Respondent violated Section 8(a)(1) by creating the impression among its employees that their union activities were under surveillance.
- On May 1, the Respondent accused a leading union adherent of being inconsiderate and hurting the Company by continuing to push for the Union.
- In what the judge correctly termed "blatant violations" of Section 8(a)(2) and (1), the Respondent dominated the "Music Express Chauffeurs Committee" in an attempt to undermine employee support for the Union.

(3) Timing

The discharge of Mercho occurred within a week of his disclosure of his prounion sympathies to supervisor Williams, and a few days before the scheduled union meeting of May 4, of which the Respondent was aware.

[8] Williams was refused entrance because of his supervisory status.

[9] The facts of the instant case are distinguishable from those of *Efficient Medical* where the supervisor in question "actively support[ed] the Union." 324 NLRB at 556 fn. 11.

As stated by the judge, such "astonishing timing" further supports the inference of knowledge.

(4) Pretextual reasons and disparate treatment

Of the three reasons the Respondent advanced for its discharge of Mercho, the judge found that "at least two" (unavailability for work and abusive language) are "clearly pretextual." With respect to the third reason (filing a false unemployment claim), the judge found significant evidence of disparate treatment because the Respondent did not discharge two other employees for filing unemployment claims that the Respondent regarded as false. The record supports the judge's findings. Thus, the Respondent's raising of pretextual grounds for discharging Mercho and its treatment of him differently from other employees who engaged in similar conduct further supports the inference of knowledge.

Conclusion

In sum, as the judge found, the evidence adduced by the General Counsel is "more than sufficient to establish" that the Respondent knew of Mercho's union activities and that its antiunion animus was a motivating factor in its decision to discharge him. The Respondent, however, has "fallen short" of showing that it would have discharged Mercho even in the absence of his union activities. Therefore, the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Mercho should be affirmed.

Dated, Washington, D.C., November 28, 2003

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf of or support for International Brotherhood of Teamsters, Local 805 (AFL–CIO).

WE WILL NOT solicit grievances from our employees and imply that such grievances will be adjusted in order to discourage employees from supporting the Union.

WE WILL NOT promise or grant our employees restoration of 1-hour preparation pay, increased supervision by us of dispatchers' conduct towards employees, or other benefits and improvement in their terms and conditions of employment, in order to discourage our employees from supporting the Union.

WE WILL NOT create the impression amongst our employees that their activities on behalf of the Union are under surveillance by us.

WE WILL NOT form, dominate, administer, or contribute support to the Music Express Chauffeurs Committee (the Chauffeurs Committee) or any other labor organization.

WE WILL NOT tell our employees that we intend to form such labor organization or suggest or encourage our employees to form, participate in, or cooperate with the Chauffeurs Committee concerning terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under Section 7 of the Act.

WE WILL immediately withdraw all recognition from and completely disestablish the Chauffeurs Committee and refrain from recognizing the Chauffeurs Committee, or any successor thereof, as representative of our employees for the purposes of dealing with us concerning wages, grievances, rates of pay, or other conditions of employment.

MUSIC EXPRESS EAST, INC.

Jeffrey Gardner, Esq. and *Brian Caulfield, Esq.*, for the General Counsel.
Don T. Carmody, Esq., of Woodstock, New York, for the Respondent.
David Tykylsker, Esq., of Montclair, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 805 International Brotherhood of Teamsters (Charging Party or Union), the Director for Region 22 issued a complaint and notice of hearing

on June 28, 2002,[1] alleging that Music Express East Inc. (Respondent), violated Section 8(a)(1), (2), and (3) of the Act.

The trial with respect to the allegations in the above complaint was held before me in Newark, New Jersey, on September 3, 4, 5, and 24. Briefs have been filed by the Respondent and General Counsel and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office and place of business in Elmwood Park, New Jersey, where it is engaged in the business of providing transportation, namely limousine and car services. During the preceding 12 months, Respondent derived gross revenues in excess of $500,000 and purchased and caused to be delivered to its Elmwood Park facility goods valued in excess of $5000 directly from points outside the State of New Jersey.

Respondent admits, and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Respondent's Operations

Respondent is a limousine company specializing in providing transportation to music and entertainment industry artists and executives. Respondent's CEO is Cheryl Berkman, who is based in Los Angeles, California, where Music Express West is located, a separate corporation from Respondent, but engaged in the same business, but on the West Coast. Berkman is the CEO of that corporation as well.

Richard Badalamenti is the vice president and general manager of Respondent, and is stationed at its Elmwood Park facility.

Isaac Williams is employed by Respondent as a driver-trainer, and Respondent admits that he and Badalamenti have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

Barbara Chizmadia is employed as Respondent's director of operations.

Respondent also employs several dispatchers, including Lee Wong and Sergio Segallini.[2] Although the record establishes that the dispatchers distribute work to the drivers, and at times issue instructions and orders to them, the complaint does not allege that the Wong or Segallini or the dispatchers employed by Respondent are supervisors or agents of Respondent.

Respondent employs approximately 130 drivers, who are paid an hourly salary plus gratuity.

[1] All dates hereinafter are in 2002, unless otherwise indicated.

[2] Segallini is the dispatcher manager.

B. The Union's Organizational Campaign

Following the events of September 11, 2001, Respondent experienced a significant loss of business. As a result Respondent instituted several changes which angered its drivers, including the reduction of paid preparation time from 2 hours to 1 and a wage freeze. In December of 2001, Bruce Richter, who was one of the more outspoken drivers, on a visit to Los Angeles, spoke with Berkman about these and other problems that the drivers had, including the fact that Respondent continued to hire new drivers, which cut into the work opportunities of existing drivers. Berkman could not give Richter much time in December of 2001, but promised to meet with him in February of 2002, when she planned to be at the New Jersey facility.

Berkman met with Richter in February of 2002. He informed her that morale of the drivers was very low, because of the problems described above. Berkman replied that she could not change Respondent's position on raises or the lost hour, but on hiring she promised that if current drivers agreed to work on weekends, she would cease additional hiring. The day after this meeting, Badalamenti posted a memo stating that effective immediately, hiring would be stopped, as long as drivers made themselves available on weekends.

However, although Respondent stopped hiring for a few weeks, it resumed hiring although drivers were coming in on weekends. As a result Richter and fellow employee Tom Hagen contacted the Union and met with Union Representatives Matt Ginsberg and Sandy Pope in mid-March. After the union representatives explained the union benefits and the procedure for obtaining union representation, Richter and Hagen thereafter spoke to several other employees and began forming an organizing committee. Additional meetings were held by the Union on April 7 and 13. At the April 13 meeting, 14 drivers attended, and authorization cards were distributed and signed by some employees at that meeting. Cards were also given out to drivers to distribute to other employees.

C. Respondent's Reaction to the Union Campaign

On April 14, the day after the April 13 union meeting, dispatcher Wong asked employee Donald Bricker," how did the Union meeting go?" Bricker did not respond. Bricker also heard dispatcher Segallini speak to a driver, when Bricker was next in line at the dispatch window. Segallini said to the driver, "Remember Jimmy Hoffa." When the driver asked for a newer vehicle, Segallini responded, "Well, if you don't like it, take it up with your union rep."

A few days after the April 13 meeting, Don Bricker was approached by Williams at work. Williams asked Bricker if "He was down with the Union?" Bricker replied that he didn't want to say anything about it.

On April 17, Respondent posted and distributed notices, announcing a paid mandatory meeting for employees on April 18. There were morning and afternoon sessions of this meeting, both of which were run by Badalamenti. Badalamenti began the meetings by asking if anyone was recording the meeting. After no one responded, Badalamenti stated that "outside sources would be catastrophic to the company and its employees." Badalamenti then invited the drivers to air any complaints that they may have with their work. The drivers raised

several issues, such as the loss of 1-hour of prep time, wage freeze, pay for waiting time, the way they were treated by dispatchers, and the hiring of new drivers.

Badalamenti indicated that Respondent was considering giving back the 1-hour prep time, and he would discuss it with Berkman, and inform the employees of Respondent at a subsequent meeting. He told the employees that pay raises are still frozen. With respect to the other complaints raised by the drivers, Badalamenti indicated that they would be considered, and he would respond to the employees at the next meeting. Badalamenti concluded the meeting by saying that Music Express "without outside representation can handle all problems." The Union was not specifically mentioned during this meeting.

On April 24, Badalamenti met again with the drivers. He announced that Respondent was reinstating the extra hour of paid prep time that had existed prior to September 11, 2001, but that as he had indicated on April 18, wages would still be frozen. However, Badalamenti indicated that in response to drivers concerns about dispatch, that he would begin monitoring dispatch and would take over scheduling of vacation and sick leave.

Badalamenti also stated that he didn't understand why the employees still wanted a union, since Respondent was following up on last week's meeting and had some results for the employees. He added that all unions do is take your money and dues.

Badalamenti also told the employees that if employees were terminated for a sub par record, no union can change that action.

Badalamenti then indicated that Respondent was proposing the formation of a drivers committee, which would represent the drivers and act as a liaison between the drivers and management. The committee would according to Badalamenti, approach Badalamenti with problems that other drivers might have had to meet with him personally and "go over problems and try to reach a reasonable conclusion." Badalamenti informed the employees that the committee would consist of seven members, and an election would be conducted. He said that he would be passing out a sheet, asking for volunteers to sign up for the committee.

On April 26, Badalamenti issued a memorandum to all drivers, summarizing the results of the meeting. The memo reads as follows:

> To: All Chauffeurs
> From: Richard Badalamenti
> Date: April 26, 2002
> Subject: Chauffeur Meeting Results
>
> I would like to take this time to thank all the chauffeurs who attended the meetings last Wednesday for their time and input. The following is a brief summary of the decisions resulting from the meetings.
>
> 1. Rich will now oversee chauffeur activities. Rich will handle all chauffeur issues and correspondence.
>
> 2. MXE is in the process of forming a Chauffeur Committee to collect and help address chauffeur related issues and grievances.
>
> 3. Overall communications between chauffeurs and management will be improved via several methods. A new correspondence board will soon be introduced as a place where all chauffeur related memos and policy issues can be addressed by management and easily found by the chauffeurs.
>
> 4. The 2-hour prep time has been re-instated.
>
> I am willing to work as hard as needed to keep the chauffeurs and the company running at peak efficiency. I anticipate that you will also. Thank you in advance for your patience and cooperation.
>
> Rich Badalamenti

Also on April 26, Badalamenti posted another memo, stating that Respondent had hoped for more candidates to sign up for the chauffeur committee. The memo requested that drivers sign up and "make your voice and the voices of your fellow chauffeurs be heard."

The next day, Badalamenti asked Richter if he was going to volunteer to serve on the committee. Richter replied "No." Badalamenti asked "Why?" Richter replied that he did not think it would be ethical to sit on the advisory committee, because he was the head of the union organizing committee. Badalamenti responded, "If that's the way you feel, okay."

Ultimately, 19 employees signed up for the election.[3] Respondent posted a memo, dated April 30, which listed the 19 names as "Chauffeur Committee Candidates List." The election was conducted on that date. The election took place in the drivers room, and lasted all day. A box was placed in the room on the table. The drivers voted by choosing seven names out of the 19 on the list, and putting their votes into the box. Subsequently the ballots were counted by Badalamenti in the presence of the 19 candidates.

By memo dated May 2, Respondent announced the results, listed the names and thanked everyone for their participation. The memo reads as follows:

> To: All Chauffeurs
> From: Richard Badalamenti
> Date: May 2, 2002
> Subject: Chauffeur Committee is in place.
>
> Please be aware that the Chauffeur Committee is now formed and in place. I would like to thank everyone who participated in the process for making it a success. The committee will be dealing with many various issues that concern the chauffeurs of Music Express East. Many issues have already been addressed at the first committee meeting held today (May 2, 2002). The issues and concerns discussed at this meeting will be made public in the near future. The following chauffeurs will be representing you: Michael Murray #104, Victor Duncan #101, Steve Wilson #122, Ira Berlowitz #169, Bill Griffin #112, Fred Abu-Dail #219, and Anthony Tattoli #322. Please be on the watch for further writings regarding the committee and the work it is doing. Thank you for your full cooperation.
>
> Richard Badalamenti

[3] Included on the list was Emad Mercho.

On the day after the election, Badalamenti called Richter into his office. He accused Richter of being inconsiderate and hurting the company by continuing to push for the Union, and not giving him a chance. Badalamenti added that he was trying to do the right thing by organizing the committee, and that Richter was interfering with it by continuing to organize. Badalamenti also pointed to the calendar and told Richter that he knew for a long time about the organizing and pointed to May 4, and said that he knew when and where the next union meeting would be.

In fact there was a union meeting held on May 4, at the Holiday Inn Hotel. At this meeting, Williams drove up in a Music Express Car and attempted to enter the meeting. Some of the employees told Ginsberg that Williams was a supervisor and that they did not think he should be there. Ginsberg then asked Williams to step out into the hall. Ginsberg informed Williams that he had been informed by employees that Williams was a supervisor and a driver trainer, and it was not appropriate for Williams to be present. Williams objected at first, saying that he had a right to be there. Ginsberg repeated that Williams was a supervisor and should leave, but if he wanted to talk to Ginsberg, Ginsberg would leave his phone number and Williams could call. Williams then agreed to leave the meeting. A day or two after the May 4 meeting, the union organizing committee faxed a letter to Respondent. When Williams returned to the shop the next day, he informed Badalamenti that he had gone to the union meeting, because he felt that the right to be there, since he is a driver, but that the Union did not allow him to stay.

Badalamenti replied that it was up to him, but added, "I don't see why you went." Williams had not informed Badalamenti prior to the meeting that he intended to go. A day or two after the May 4 meeting, the union organizing committee faxed a letter to Respondent, specifically naming eight members of the union organizing committee, and indicating their intent to form a Union with Local 805 of the Teamsters. Although the letter was dated April 29, it was not sent until on or about May 6.[4]

On or about May 8, Badalamenti met with Bricker and Richter to discuss the letter from the union organizing committee. Badalamenti asked Richter and Bricker to hold off on the Union's organizing, and give him 3 months, in order to give Respondent a chance to prove itself, and allow the chauffeurs committee to function. Richter and Bricker agreed to the 3-month period, but asked for a statement in writing from Respondent, stating that it would not harass any union committee members. Badalamenti replied that he would check with Berkman about the letter. A few days later, Badalamenti told Richter that Berkman was not opposed to writing such a letter, but she needed to check with Respondent's legal department. About a week later Badalamenti advised Richter that Respondent could not provide the letter that the employees were seeking.

Also during the May 8 meeting, Richter observed that Respondent had recently restored the 1 extra hour of prep time to the employees, and he felt that was done because of the presence of the Union. Badalamenti replied yes.

[4] This list included Richter, Acosta, and Bricker.

On or about May 2, the chauffeurs committee formed by Respondent met and decided to distribute a questionnaire to the other drivers, asking them to express their concerns and issues that they wish presented to management. The committee members told the drivers that the committee intended to present their concerns to Berkman.

Subsequently, after the questionnaire's were returned, the chauffeurs committee sent a letter to Berman in California, dated June 7, 2002. The letter reads as follows:

> June 7, 2002
>
> Ms. Cheryl Berkman
> Music Express West Inc.
> 2601 Empire Avenue
> Burbank, CA 91504
>
> Dear Cheryl,
>
> This letter is being written to you on behalf of all the chauffeurs of Music Express East. We are the charter committee who were elected by our peers to represent on a continuing basis the concerns of the chauffeurs staff. In order to have a more direct line of communications between you, Richie and the chauffeur staff, this committee was formed.
>
> As you are aware, the events of September 11th have delivered a tremendous toll on all of our lives. We have endured a period of "belt tightening" times for the immediate problems of our company. It is the consensus opinion of the chauffeur staff that ample time has passed since the events of 9/11/01, and we feel that the time has now come to reimplement the old policies-Re: Raise Structure, 401K, Medical benefits.
>
> At this time we respectfully request that you lift your raise freeze and for you to approve a .50 cents minimum per hour wage increase at the time of the chauffeur's annual review. We feel that this rate is an acceptable amount so your employees can continue their hard work and give us an hourly increase that we have earned.
>
> We also request at this time to keep secure all existing Music Express benefits with the agreement that they will not be reduced in any way. We would like to invite you for a discussion on improving other existing benefits and for the introduction of future incentives.
>
> We further ask consideration to increase the medical benefit package to make it more affordable for employees to insure their families. You always say we are family, so you will understand that we also need to have structure, security and stability in our families with a good sound benefit package.
>
> The meeting held by you and your staff while not intending to do so, had a demoralizing effect on your staff here in New Jersey. In fact it motivated some of your staff to seek out other sources for help. This is not what your chauffeur staff wants. We are reaching out to you, we need your help! This committee wants to reach a reasonable agreement so we can move forward and become a whole productive group.

We would like to thank you for taking the time to read our proposal. We trust that you find it a reasonable one and look forward to your response within the next couple of weeks.

Music Express East, Inc.—Committee Members:

Michael Murray Ira Berlowitz Steve Wilson Victor Duncan Bill Griffin Anthony Tattoli Fred Abu-Dial

Berkman responded by letter of June 12, essentially refusing to deal with the chauffeurs committee, because the Union filed charges[5] against Respondent, and based on advice of counsel. The letter reads as follows:

June 12, 2002

Dear Michael, Bill, Ira, Anthony, Steve, Fred and Victor,

I am in receipt of your letter of last Friday, June 7th. I sincerely appreciate the concerns you have expressed for our Company, and your desire to collaborate with me and your Management in rebounding from the debilitating impact of the tragedies of September 11th upon our industry.

You mention that some of the Chauffeurs felt the need to seek sources outside of our Company for help. I wish all of our Chauffeurs displayed the same confidence in themselves and our Company as that shown by you, and the Chauffeurs on whose behalf you have spoken. Yet, the fact remains that, as a consequence of the pursuit for outside intervention—even if only by a few—the rules have been radically changed for all of us. Specifically, Local 805 of the Teamsters—the "outside help" I imagine you were referring to—has interfered with your effort to deal directly with me and your Company, and has completely "tied our hands." The union already has filed a series of unfair labor practice charges with the National Labor Relations Board, claiming that Rich Badalamenti and your other New Jersey Management violated [F]ederal law in conducting several meetings, which some Chauffeurs sought in order to address various concerns. The union is claiming that we harassed our Chauffeurs, spied on you, interrogated you, and then rewarded you for rejecting the Teamsters.

The union is also contending that one Chauffeur, who was terminated for perfectly justifiable reasons, was actually (they claim) fired because he was a Teamster activist, even though Management had no idea that he had anything to do with the union. Plainly, the Chauffeur and the union have fabricated a story for the National Labor Relations Board that he was an active Teamster supporter, in the hope that Music Express would be forced to take him back, so that they could claim that no one can be fired for so long as they are involved with the union. This is false. Music Express has the right to continue managing our business without regard to the union, and we intend to do so. We have not, and we will not, discriminate against any Chauffeur for engaging in whatever lawful activity they choose to pursue. However, we intend to defeat the union's false accusations about the Chauffeur's termination, no matter how long it takes to expose their lies. Eventually, the truth will come out.

Worse yet, as soon as the Teamsters learned that some Chauffeurs had formed your Committee, they moved to eradicate it! The Teamsters, among other outrageous moves, has asked the National Labor Relations Board to file a lawsuit in the United States Federal Court in Newark to prevent Music Express from communicating with your Committee, in any manner, including by an exchange of correspondence such as this. So that you will fully understand how extreme this Teamster request truly is, the National Labor Relations Board gets involved in the type of injunction proceeding which the union has requested in only a handful of cases out of thousands around the U.S.A. every year.

Let me be crystal clear about one thing: Music Express and I will fight for as long as it takes to defend ourselves against such patently false and offensive charges! Unfortunately, in the meantime, I have been advised by our legal counsel that we would only add fuel to the union's fire if I do anything other than inform you (as I am by this letter) that the union is seeking to disband your Committee and preclude the Company from unilaterally responding in a productive manner to the issues you have raised. I am sorry to disappoint you, but the union has given me no choice but to proceed cautiously, with the guidance now of lawyers to protect all of us, for so long as the union outsiders continue to organize among our Chauffeurs and attempt to speak for you. You were fair and well intentioned in sharing with me that you feel mistakes were made, and that, even though not intended, your morale was hurt. Regrettably, the Teamster charges have taken away any chance I had to make amends, without the union in the picture, and to act quickly to restore your faith in me and your Company.

Of course, as I am sure you can figure out for yourselves, a union knows when it tries to organize any company's employees, that if the employees have formed a committee (like yours) to work with management to solve their problems, all the union had to do is force the company (by National Labor Relations Board charges such as we are facing) to cease interacting with the employees' committee, and then, most employees, out of sheer frustration, will often tend to vent their anger at the company, and blame management for not fixing their problems. Frankly, that's what's going on here at Music Express. But, I'm confident you're all smart enough to place this blame precisely where it belongs.

As you may know, the Teamsters had, and still has, another choice: The union could ask the National Labor Relations Board to conduct a secret ballot election, so that you and your Chauffeurs could decide whether to let the Teamsters represent you in dealing with Music Express, or to continue speaking for yourselves (perhaps through a committee such as yours). Unfortunately, the Teamsters

[5] The Union filed its initial charge on May 7, concerning the discharge of Mercho, and then on May 17, filed an amended charge, alleging various unfair labor practices, including the creation of a drivers committee.

have chosen, instead, to go down the costly, time-consuming, and contentious path of litigation.

I have no alternative but to refer you, at this time, to your fellow Chauffeurs and the National Labor Relations Board for a solution to the issues you have raised in your letter.

Sincerely,
Cheryl Berkman

The record contains no further evidence of any dealings by Respondent with the chauffeurs committee, nor whether the committee is still in existence.

D. The Discharge of Emad Mercho

Emad (Teddy) Mercho was hired by Respondent as a driver in January of 1999. Mercho worked regularly Sunday through Fridays, generally starting work at about 1 p.m., and working until midnight. However, at times when one of his regular clients would request him, Mercho would agree to accept a job in the mornings.

Mercho had some discussion with Richter and other employees in March and April about bringing in the Union. Mercho was informed about the union meetings in April, but he did not attend because he was working.

On April 23, at about 1 a.m. in the morning, after his shift, Mercho and fellow employee Johnny Acosta were in Respondent's parking lot. Acosta gave Mercho a union authorization card to sign. They discussed it, Mercho read it and filled it out, signed it and returned it to Acosta. Acosta subsequently gave the card to Richter. No representative from Respondent was around or observed Mercho sign the card.[6]

Mercho attended the April 24 meeting conducted by Badalamenti, wherein as related above, Badalamenti proposed the formulation of a chauffeurs committee, and distributed a list for volunteers to sign up. Mercho was one of only two employees who signed up for the committee at the April 24 meeting. As also related above, Badalamenti subsequently sent a memo expressing disappointment about the lack of volunteers, and again asking for employees to sign up and volunteer.

On April 24, the day after he signed the union card, as Mercho was coming into work in the parking lot, he met Isaac Williams. Mercho was aware that Williams had been a driver-trainer, but for some period of time after September 11, 2001, he was relieved of his trainer responsibilities, and became solely a driver. Williams was not happy about that decision, and he (along with other drivers) was complaining about harassment from dispatchers. Therefore, Mercho felt that perhaps Williams might be interested in the Union. Mercho explained to Williams what was going on with the Union, and that the employees needed to support the Union to give them some power against the problems caused by Respondent. Mercho informed Williams that he (Mercho) had signed an authorization card for the Union, and asked Williams if he would be interested in signing a card to support the Union. Williams replied that he thought that the Union was a good idea, but since he had been reinstated to his training position, he wanted to think about it.[7]

On or about April 30, when Mercho was picking up his assignment, Segallini called him a "loser." Mercho made no response, but called Barbara Chizmadia, left a message on her voice mail complaining about Segallini, and asked to see her about it.

On May 1, Chizmadia called Mercho at home and asked him to come to the office to see her. However, when Mercho arrived at the office Chizmadia was not there, and Mercho was called into Badalamenti's office. Badalamenti informed Mercho that it would be good for you and good for the Company if he no longer worked for Respondent. Mercho asked why, and Badalamenti explained that after "what's been happening," Mercho no longer works for the Company and was terminated. Mercho pressed Badalamenti for an explanation of the reason and what he meant by "what's been happening," but Badalamenti would not answer, and merely wished Mercho "good luck" and shook his hand.

Later in the week Mercho went into the office pick up his check. At that time he asked Chizmadia what the reason was for his discharge. She replied, "I don't know what's going on."

On May 4, Mercho attended the Union meeting.[8] Mercho informed Ginsberg and the other employees that he had been terminated. He told Ginsberg about how he had signed a card and was fired without being given a reason. He told Acosta that he thought that he was fired because of his union activities.

[6] This finding is based on the mutually corroborative testimony of Mercho, Acosta, and Matt Ginsberg, who testified that he saw the card signed by Mercho, prior to the termination. Respondent argues that this testimony should not be credited since the card was not produced. I do not agree. I find the corroboration of Acosta (who is still employed by Respondent) and Ginsberg sufficient to credit Mercho that he signed a card on March 23. Mercho's testimony as to dates is somewhat confusing, since he testified that he signed the card after the meeting he attended with Badalamenti on April 18, but in fact that meeting, was on April 24. But Acosta was certain that the date of the signing was April 23, because it was the day before the April 24 meeting. His testimony I found to be credible, particularly since he is still employed by Respondent. Therefore, based on the foregoing, I conclude that Mercho signed the union authorization card on April 23.

[7] This finding is based on the testimony of Mercho. Although Williams unequivocally denied having this conversation with Mercho, I credit Mercho. In addition to comparative demeanor considerations, I rely upon the fact that Williams insisted that he was not angry about being temporarily relieved from his training position, which I find highly dubious. Moreover, Williams insisted that not only did he not know about Mercho signing a card, but had no knowledge of any specific employee, even Richter being a union supporter. I find this testimony clearly unpersuasive, since even Badalamenti conceded that he was aware of the fact that Richter and Bricker were union supporters. Also, I have found above that Williams questioned Bricker about whether Bricker supported the Union.

Further, Williams in fact admitted that he tried to attend the union meeting on May 4, which indicated that he did have an interest in the Union, which supports Mercho's testimony that Williams said that the Union was a good idea, and that he would think about signing a card. Thus his attempting to attend the May meeting, suggests that he wished to find out more about the Union.

[8] This was the first union meeting that he attended.

He was advised by Ginsberg that a National Labor Relations Board charge would be appropriate.[9]

Badalamenti was Respondent's primary witness with respect to the discharge decision made by Respondent. According to Badalamenti, sometime during the third week of April, he saw a copy of a form from the New Jersey Department of Labor, which indicated that a claim had been filed on behalf of Mercho for unemployment, which listed his last day worked as April 1, and the form had a date of mailing as April 15. Badalamenti then approached his Dispatcher Manager Segallini and asked if Mercho was still working for Respondent, since it had received an unemployment claim from Mercho. Segallini, according to Badalamenti, replied that Mercho was still working for Respondent, but that Mercho hasn't been around as much, and suggested that Badalamenti listen to a recent taped conversation between Mercho and Segallini, which might clarify the situation.

Badalamenti testified further that he then listened to a copy of the tape-recorded conversation, which occurred on April 18.

A transcript of this conversation was submitted by Respondent, which the parties agreed was an accurate translation of the discussion. It began with Segallini asking Mercho how he was doing and why Mercho appeared to be unhappy or mad at Respondent.

Most of the discussion revolved around Mercho's dissatisfaction and complaints about the amount and type of assignments that he was receiving from the dispatchers. He believed that he was not being given his fair share of apparently more lucrative or desirable assignments, such as vans or stretchs. He also complained about having to wait between jobs for hours, before receiving another assignment. Segallini responded at various times that Respondent had nothing against him, and suggested that he call in earlier for jobs, which could improve his chances of getting more work.

At one point in the conversation, Segallini asked Mercho about when he was available. Mercho responded Monday through Friday. At another point in the conversation, Segallini observed that Mercho would no longer be working on Sundays anymore. Mercho appeared to confirm that statement, and complained that the dispatcher was not giving him work on Sundays, so he had to get a part-time job, in order to pay his bills. Segallini asked Mercho what he does during the day. Mercho replied that he had another job, not a limo driver. Segallini asked if this job was permanent, even if Respondent gets busy. Mercho answered "No, no, no."

Mercho used the word "bullshit," three or four times during the conversation, either in reference to statements made by Segallini or to the way Mercho believed he was being treated.

After hearing this tape, Badalamenti asserts that he decided to discharge Mercho, but he wanted to get the opinion of his counsel before he effectuated the decision. Badalamenti testified that the reasons for his decision were that Mercho was filing for unemployment, when he was still working for Respondent and that he had told Respondent during the tape, that he had another job. Badalamenti testified as follows: "I don't agree with people collecting unemployment if they're not entitled to it. And then, on top of that, then he also got another job somewhere. Is he working off the books and collecting and working for me? I'm starting to wonder a lot of things, and it really, 'pushed all my buttons.' Geez, I felt like it was an unemployment claim for no reason."

Additionally, Badalamenti testified that the tape disclosed that Mercho no longer was honoring his schedule, by refusing to work on Sundays any longer, and that he used profanity in speaking to Segallini. Further, Badalamenti asserts that he felt that Mercho's situation paralleled another case that Respondent had with another driver.

Therefore, Badalamenti testified that he called his corporate counsel, Martin Goldman, and asked him to listen to the tape and advise Badalamenti what to do. According to Badalamenti he did not tell Goldman at that time that he had decided to fire Mercho but only that he had a situation that seemed similar to Debowsky, and he wanted Goldman's opinion.

Badalamenti further testifies that after Goldman received the tape, Goldman went on vacation, so that he didn't hear from Goldman, until May 1. At that time, Badalamenti asserts that Goldman informed Badalamenti "you probably gotta let him go," because "its too much like Debowsky." Badalamenti also claims that Goldman advised him to be vague about the reasons for discharge, when informing Mercho, and just say "things aren't working out."

A termination report was prepared by Respondent's H.R. Representative "Buddy" at Badalamenti's direction, which Badalamenti signed on May 1. The form listed as reasons for separation, "decreased availability for work, application for unemployment while still employed, abusive language to dispatcher."

Respondent also adduced evidence through Robert Smith a representative from the New Jersey DOL, which established that on April 12, an application for unemployment insurance for Mercho was filed by phone stating his last day of work was April 1. The testimony also reflects that this was actually a reopening of a prior claim filed on behalf of Mercho in September of 2001. At that time, subsequent to September 11, 2001, a number of companies, including Respondent became involved with partial unemployment claims, which were filed on a mass basis for many employees. Thus employees could receive partial unemployment, even if they worked part time during various weeks. Mercho received both partial and full unemployment benefits from September 15, 2001 to October 30, 2002. He received partial benefits for those weeks, where information was submitted reflecting that he received partial earnings for certain weeks.

Chizmadia furnished testimony which was corroborative of Smith, in that after Respondent received a printout of Mercho's unemployment history from the New Jersey Department of Labor on September 9, 2002, she spoke to Robin Clark a representative of the agency. Clark told her that based on Clark's reading of the printout, Mercho had called in to the Department of Labor on April 12, and asserted that he was laid off on April 1.

This printout also reflected that Mercho actually received full benefits from unemployment, starting on April 13, 2002. It also showed that no earnings were reported for Mercho for

[9] The charge alleging his discharge to be unlawful was filed by the Union on May 7.

these weeks. A subsequent printout, introduced by General Counsel, dated September 20, 2002, showed that earnings were in fact reported for Mercho for the weeks of April 13 through April 30. These two documents indicate that these earnings were not reported until some time between September 9, 2002 and September 30, 2002, which is the period after Mercho's testimony in this matter.

Mercho attempted to explain the filing in April by asserting that he believed that he was merely filing again for partial unemployment, as he did in September of 2001. He asserts that he filed at the suggestion of Chizmadia, after he complained to her about the fact that he was not receiving sufficient work from Respondent. Chizmadia denied having any conversation with Mercho about unemployment insurance in April of 2002. I credit Chizmadia's testimony in this regard, and find that Mercho sought to reopen this claim on his own in April of 2002. I also find that Mercho probably did so because he believed that he wasn't getting enough work and thought that he could collect at least partial unemployment, starting in April. However, I also find that he did not report his earnings from Respondent in April of 2002 to the Department of Labor, and did not do so until September 2, 2002, after he testified, and he realized his failure to have done so could be a problem. I do note that Mercho was terminated on May 1, shortly after he reopened his claim, and he may have intended to report his April earnings, but did not do so, since he was fired on May 1.

As related above, Badalamenti made several references to the Debowsky case as allegedly parallel to Mercho's, and which according to Badalamenti was the reason that Goldman allegedly recommended Mercho be terminated. In that regard, Respondent introduced no documents or any evidence concerning the Debowsky case, nor did Goldman testify to corroborate Badalamenti or to explain why Goldman allegedly felt the cases were parallel and required that Respondent terminate Mercho.

Badalamenti did furnish however, under cross-examination some details about the case. According to Badalamenti, Barry Debowsky was a senior driver for Respondent, and got involved in a pay dispute with Respondent. This dispute escalated into a lawsuit for $10,000 by Debowsky. While this lawsuit was progressing, Debowsky started to gradually stop coming to work, and refusing work for Respondent. At some point, while still employed by Respondent, Debowsky filed for unemployment. Since Debowsky had not been laid off by Respondent, after consultation with Goldman, Respondent took the position that he had resigned, and contested Debowsky's unemployment claim. The unemployment claim was decided in favor of Debowsky after a telephone hearing. While Respondent appealed this determination to the highest level, the appeals were unsuccessful, and unemployment benefits were paid to Debowsky. The lawsuit for the $10,000 back wages against Respondent was still pending at the time of the hearing.

The record reflects that Respondent never contested Mercho's unemployment claim. It appears that at one point Respondent might have intended to do so, since files reflect that the form was partially filled out, and under the question reason for separation, the words "filing partial unemployment benefits" was written in by Respondent's H.R. director, who did not testify. The form was not dated, or signed by anyone from Respondent, so it is not even clear whether this comment was written in before or after Mercho's discharge on May 1.

General Counsel introduced several documents from Respondent's personnel files, dealing with instances of prior disciplinary actions against other employees. They include a termination report for employee David Cooke, dated January 23, 2002. It reflects that he was discharged for job abandonment, and refers to attached writeups. These documents reveal that Cooke had applied for temporary unemployment insurance in September 2001, although he was not one of those temporarily laid off at that time. It also appears that he had not called in for work after September 9, 2001. Finally, on January 23, 2002, Cooke was called into Respondent's office to speak with Chizmadia and Segallini. Cooke was asked by Respondent why he had filed for unemployment and said he was temporarily laid off on September 14, 2001, when no one from Respondent ever laid him off. Cooke replied that he did not remember. He was asked who laid him off and did he receive a letter from Respondent. Again Cooke did not remember. Cooke also informed Respondent that he had not called for work for months, because he was still upset about the September 11, 2001 tragedy.

Chizmadia's note added that Cooke was abrupt and hostile and before she finished the conversation, got up and said abruptly, "Are you going to fire me or not?" and stormed out of the office. By letter dated January 23, 2002, Respondent notified Cooke that he was terminated. The letter goes on to say, "after you left my office today so abruptly and after further discussion, we feel due to the lack of respect you have shown by not returning to work or communicating with us since your last day of work which was September 9, 2001. These actions on your behalf are considered job abandonment." Notably, the letter made no reference to Cooke's having filed for unemployment, although he was not laid off. Respondent also advised the Department of Labor by letter of January 25, 2001, that Cooke was not laid off, and that the claim for him was falsely submitted.

Documents from the personnel file of Keith Davis reveal that effective September 4, 2000 he declined to work on Sundays, and then on April 7, 2001, wrote to Respondent that he was not available on Saturdays either. The letter was discussed with Davis, who told Respondent that he had babysitter problems. Respondent agreed to work with Davis, and indicated that it would not be a permanent situation and would revisit this in a couple of months. Apparently Respondent tolerated Davis's continued failure to work weekends, since the files reflect no further changes in his status, until he voluntarily quit his employment on February 22, 2002 to move out of town.

Finally, Respondent's files reveal that employee Harris Yakov received two 1-day suspensions for abusive language. On January 4, 2001, his first suspension was signed by Chizmadia, and reflects that Yukov was suspended for disorderly conduct and insubordinate behavior. It adds that Yakov was argumentative and aggressive, continued to yell, claimed favoritism in the office and that office personnel do not do their jobs properly. The comment card which appears to form part of the basis for this incident, was filled out by a dispatcher on November 18, 2000. It indicates that Yakov started yelling about not getting a switch, and threw down the keys and stormed off.

Yakov received another 1-day suspension on January 19, 2001, due to "abusive language towards dispatcher" for an incident on January 18, 2001. The comment card reflects that Yakov "verbally abused" the dispatcher, by calling the dispatcher an "asshole" and a "son of a bitch." The comment concludes with the dispatcher stating, "I will no longer take verbal abuse."

Yakov's file also included another comment card, dated January 8, 2001 from Segallini, which stated Yakov "always has a snide remark instead of answering the question posed to him." It does not appear that Yakov was disciplined for this conduct.

Yakov was not further disciplined, and resigned on March 20, 2001. His termination report, which indicates that he resigned, states that Respondent would not recommend him for rehire, because he was "very abusive with co-workers and bad attitude."

As I have noted, the above files contained comment cards, filled out by dispatchers which formed the basis for discipline of various employers. However, no such comment card was filled out by Segallini, concerning the taped conversation that he had with Mercho, which Badalamenti asserted formed the basis for his discharge decision. Badalamenti also admits that Segallini never complained to him about abusive language by Mercho or indeed about Mercho's refusal to work on Sunday. In fact it appears that had not Badalamenti approached Segallini about Mercho, Segallini had no intention of bringing to Badalamenti's attention the taped conversation.[10]

Finally, Mercho did not dispute the conversation with Segallini, but asserts that the reason for the discussion, was Mercho's prior complaints to Chizmadia about Respondent's failure to assign him sufficient or desirable work. Mercho adds that in fact he did not have another job at the time, although he admits telling Segallini that he did. He explained that he was "trying to trick" Respondent, since he felt that they were not giving him enough work. He also asserts that he believed that Segallini was "trying to trick" him, because he felt that he had been given an assignment for a job on Sunday, when it knew or should have known that the job was not going to show up. In fact according to Mercho, the client did not show up, as Mercho had feared, and he received only 2 hours no show pay for that job.

III. ANALYSIS

A. The Alleged Violations of Section 8(a)(1) of the Act

1. The solicitation of grievances

It is well established that when an employer institutes a new practice of soliciting grievances during a union organizational campaign, there is a compelling inference that it is implicitly promising to correct those inequities it discovers as a result of its inquiries and likewise urging its employees that the combined program of inquiry and correction will make union representation unnecessary. *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992); *K-Mart Corp.*, 316 NLRB 1175, 1177 (1995); *Foamex*, 315 NLRB 858, 859 (1994); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971).

There can be no doubt that Respondent has violated the Act, in accord with the above precedent, by soliciting grievances from employees with an implied promise of benefit if employees reject the Union.

Thus on April 18, Respondent's Vice President Badalamenti conducted a mandatory meeting during which he invited employees to air any complaints that they may have, after informing the employees that "outside sources would be catastrophic to the company and its employees." The employees raised various problems and issues, including the loss of 1-hour prep time. Badalamenti informed the employees that he would consider their complaints, and would get back to them at the next meeting. He concluded the meeting by saying that Respondent, "without outside representation can handle all problems."

Thus while Badalamenti made no specific mention of the Union, his references to "outside representation," and "outside sources," can have no other meaning. It is clear that Respondent at that meeting solicited grievances from employees, with an implied promise to resolve them, in order to discourage union representation. Such conduct is violative of Section 8(a)(1) of the Act. *Foamex*, supra; *K-Mart*, supra; *Embassy Suites*, supra; *Reliance Electric*, supra.

2. The promise and grant of benefits

At the April 18 meetings Badalamenti made specific reference to the complaints of employees, particularly the loss of 1-hour prep time, and stated that he would consider these matters and get back to the employees at the next meeting. At the April 24 meeting, Badalamenti announced that Respondent was granting the employee's request to restore the 1-hour prep time that had been taken away, and that Badalamenti would, in response to employees' complaints about dispatchers, became more personally involved in matters previously handled by dispatchers, and would monitor dispatchers conduct. Notably Badalamenti added that he didn't understand why the employees still wanted a Union, since Respondent was following up on last week's meeting and had some results for employees. Further Badalamenti suggested the formation of chauffeur's committee which would represent drivers and go over problems with Badalamenti and reach a conclusion.

The above evidence demonstrates blatant violations of Section 8(a)(1) of the Act of promising and granting benefits to employees, to dissuade them from supporting the Union. Clearly the entire thrust of Respondent's conduct at these meetings was to promise the employees that their concerns can and would be taken care of, without the necessity of a Union, and that the chauffeurs committee would be a substitute for the Union. Such conduct is violative of Section 8(a)(1) of the Act. *Research Federal Credit Union*, 310 NLRB 56, 62–63 (1993); *Hunter Douglas, Inc.*, 277 NLRB 1179, 1185 (1985); *J. Coty Messenger Service*, 272 NLRB 268, 269 (1984).

Further instances of unlawful promise of benefits occurred during Badalamenti's conversation with Richter on May 3, the day after the election of the chauffeurs committee. Badala-

[10] Segallini did not testify. Thus there is no explanation of why Segallini did not find it necessary to notify Badalamenti about the conversation or why he did not fill out a comment card, detailing the discussion.

menti accused Richter of being inconsiderate and hurting the Company by continuing to push for the Union, and not giving him a chance. Badalamenti added that he was trying to do the right thing by organizing the committee. These comments are additional implied promises that Respondent through dealing with the committee will remedy the complaints of the employees, instead of having to resort to the Union.

Additionally, on May 8, Badalamenti met with Bricker and Richter to discuss the letter sent by the union organizing committee. Badalamenti asked the employees to hold off on the Union's organizing for 3 months, in order to give Respondent a chance to prove itself and allow the chauffeurs committee to function. These remarks are further instances of an unlawful implied promise of benefit, to dissuade employees from engaging in union activities, and is violative of Section 8(a)(1) of the Act.

Moreover, at the April 24 meeting, the above facts reveal that Respondent granted benefits to employees. Thus Badalamenti announced that Respondent was restoring the 1-hour prep time that had been taken away, and that in response to employee complaints about dispatchers, that he would monitor dispatch and take over some dispatch functions. Badalamenti summarized these decisions in an April 26 memo to employees. There can be no doubt that these benefits were granted in order to discourage employees from supporting the Union. Thus the timing and context of the announcement, coming in the midst of antiunion statements, including Badalamenti's own statement on April 24, that he couldn't understand why employees still wanted a union, since Respondent was following up on last week's meeting and had some results for the employees, creates a strong inference of unlawful motivation. Since Respondent has failed to come forward with any evidence to establish a legitimate reason for the timing of these benefits, Respondent has further violated Section 8(a)(1) of the Act. *Holly Farms Corp*., 311 NLRB 273, 274 (1993); *B & P Plastics*, 302 NLRB 245 (1991); *Hunter Douglas*, supra; *Research Federal*, supra at 62–63.

3. The alleged surveillance and impression of surveillance

In early May, Badalamenti called Richter into his office. After accusing Richter of being inconsiderate by continuing to push for the Union, I have found above that Respondent unlawfully promised benefits to employees, when Badalamenti asked to be given a chance to do the right thing by employees. Badalamenti then informed Richter that he knew for a long time about the organizing and pointed to May 4 on the calendar and added that he knew when and where the next union meeting would be. In these circumstances, Badalamenti's comments about his knowledge and details of the union meeting, would reasonably lead employees to assume that their union activities were under surveillance, and are therefore violative of Section 8(a)(1) of the Act. *The Hertz Corp*., 316 NLRB 1022, 1025 (1993); *Bay Corrugated Container Co*., 310 NLRB 450 455–456 (1993).

The General Counsel also contends that comments made to or in the vicinity of Bricker by various dispatchers are similarly violative of the Act. Thus the record revealed that an unnamed dispatcher stated to a driver, "Here come the shop steward." Further, Night Dispatcher Wong asked Bricker "How did the union meeting go?" Finally, Segallini made comments to a driver, with Bricker next in line. These statements included "Remember Jimmy Hoffa," and when the driver asked for a new vehicle, "Well, if you don't like it take it up with your union rep."

While some or perhaps all of these comments could be found to have given the impression to employees that their activities were under surveillance, a crucial element for finding a violation is missing. The statements must have been made by supervisors or agents of Respondent. Here the complaint does not allege that Segallini, Wong, or any other dispatcher of Respondent are supervisors or agents of Respondent. Nor did General Counsel seek to amend the complaint to so allege. Thus the issue of the supervisory or agency status of these individuals was not fully litigated. In these circumstances, I find it inappropriate to find violations of the Act, based on the conduct of these dispatchers as General Counsel requests.

General Counsel also alleges that Respondent engaged in actual surveillance of the Union activities of its employees by the conduct of admitted Supervisor Williams of signing in at and attempting to attend the union meeting on May 4, at the Holiday Inn Hotel. *Fairfax Hosp*., 310 NLRB 299, 320 (1993); *Hoschton Gourmet Co*., 279 NLRB 565, 567 (1986). General Counsel argues that since Williams intentionally tried to attend the meeting, such action has the tendency to unreasonably chill the exercise of employees Section 7 rights, and constitutes unlawful surveillance of protected activities. *Hoschton Gourmet,* supra; *Fairfax Hospital,* supra. I do not agree.

"Not all instances where employer representatives are at or in the vicinity of the union activities of their subordinate employees amount to unlawful surveillance." *King David Center*, 328 NLRB 1141, 1142 (1999); *Gossen Co.*, 254 NLRB 339, 353 (1981), modified on other grounds 719 F.2d 1354 (7th Cir. 1981).

Moreover, the mere presence of employer's representatives at a union meeting, without more specific evidence that it was not for a legitimate purpose, or that it was for the purpose of observing the meeting, establishes neither surveillance of the meeting, nor a reasonable basis for an impression of surveillance in the minds of employees in attendance at the meeting. *Atlanta Gas Co*., 162 NLRB 436, 438 (1966); see also *Universal Packaging Co*., 149 NLRB 262, 263–264 (1964) (Board reverses ALJ and finds that presence of supervisor at motel where union meeting took place was not violative of the Act. The Board finds no evidence purpose of supervisor going to hotel was to observe meeting.)

Therefore, based on the above precedent, it is essential to examine the facts that led to Williams' attendance at the meeting. Here the organizing committee distributed a flyer inviting drivers to attend a union meeting on May 4 at the Holiday Inn. Since Williams was also a driver in addition to being a trainer and a supervisor, he reasonably concluded that he was being invited to the meeting. Indeed the flyer did not specify that supervisors were excluded. Moreover, as I have found above, on or about April 23, Mercho had asked Williams to sign a card for the Union. Williams indicated to Mercho that it was a good idea, but he wanted to think about it. Therefore, in these cir-

cumstances, not only is there no evidence in the record that even suggests that Williams intended to go to the meeting to spy on employees, but on the contrary the evidence establishes clearly that he went to the meeting because he wanted to attend, because he believed that he had been invited, and that as a driver he had a right to be there. A supervisor has a right to attend union meetings, as long as he is not directed to do so by the employer, and even to join the union, if admitted to membership. *Howard Johnson Motor Lodge*, 261 NLRB 866, 871 (1987).

Here there is no evidence that Respondent directed Williams to attend. Although Williams did inform Badalamenti of what transpired when he went to the meeting, this evidence does not establish that Badalamenti directed him to go or even knew about it beforehand. In fact Badalamenti's response to Williams, that it was up to him, but that "I don't see why you went," establishes that Badalamenti did not instruct Williams to go to the meeting, and was not aware of Williams' intention to go to the meeting prior to Williams going.

Based on the above analysis and precedent, I conclude that Williams' conduct in attending a union meeting, to which he had been invited, and where he was attending because he believed he was entitled to be there, cannot be construed as unlawful surveillance, and is not violative of the Act. I shall therefore recommend dismissal of this allegation in the complaint.

4. The alleged interrogation

In mid-April, Williams asked employee Bricker, "if he was down with the Union." Bricker replied that he didn't want to say anything about it. The complaint alleges and General Counsel contends that this questioning constitutes coercive interrogation, in violation of Section 8(a)(1) of the Act. I agree.

Here, at the time of the questioning, the union campaign was in its infancy, and neither Bricker nor anyone else had revealed themselves to be union adherents. Thus Bricker was not an open union adherent. *Hertz Corp.*, 316 NLRB 672, 684 (1995); *Southdown Care Center*, 308 NLRB 225, 233 (1992); *Sivalls Inc.*, 307 NLRB 926, 1003 (1992); *Jakel Motors*, 288 NLRB 730, 732 (1988).

Also, the evasive response made by Bricker that he didn't want to say anything about it, objectively indicates possible fear of retaliation, and is strongly supportive of the coerciveness of the question. *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993); *NLRB v. Brookwood Furniture*, 701 F.2d 452, 462 (5th Cir. 1983); *Southdown Care*, supra.

Finally, the questioning occurred in the context of other unfair labor practices that I have found above, such as unlawful promises and grant of benefits, solicitation of grievances and creating the impression of surveillance, and the unlawful creation and domination of the chauffeurs committee, which I find below. In such circumstances, these unfair labor practices reasonably tend to color the employees perception of the character and reason for the inquiry, and render such questioning coercive. *Ickikoh Mfg.*, 312 NLRB 1022, 1025 (1993); *Jakel Motors*, supra at 730; *EDP Medical Computer Systems*, 284 NLRB 1232, 1264–1265 (1987).

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by Williams' coercive interrogation of Bricker.

5. The alleged domination of the chauffeurs committee

In determining whether Respondent has violated Section 8(a)(2) of the Act by dominating or supporting the chauffeurs committee, it is necessary to conduct a two-pronged inquiry. The first step involves examining whether the committee is a "labor organization" as defined in Section 2(5) of the Act. Second, if the committee satisfies the criterion for a labor organization, the second inquiry is whether Respondent has dominated or interfered with the formation or administration of the committee. *Polaroid Corp.*, 329 NLRB 424 (1999), *EFCO Corp.*, 327 NLRB 372, 373 (1998); *Electromation, Inc.*, 309 NLRB 990 (1992), enfd. 35 F.3d 1140 (7th Cir. 1994).

In defining a labor organization under Section 2(5) of the Act, the Board assesses whether, (1) the employees participate; (2) if the organization exists, at least in part, for the purposes of dealing with the employer; and (3) if these dealings concern conditions of work such as grievances, wages, rates of pay, hours of employment. *EFCO*, supra; *Polaroid*, supra; *Electromation*, supra.

There can be no doubt that the chauffeurs committee here meets the definition set forth above. Indeed, Respondent does not dispute, as it should not, that numbers one and three in the above-definition have been met. Thus I find, without any further discussion, that employees participate in the committee, and that the committee's dealings concern terms and conditions of employment.

Respondent does dispute however, that the General Counsel has established that the committee exists at least in part for the purpose of "dealing with" Respondent. In that regard the Board has explained that "dealing with" contemplates a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management. The bilateral mechanism ordinarily entails a pattern or practice in which the group of employees, over time, makes proposals to management, and responds to these proposals by acceptance or rejection by word or deed. *Polaroid*, supra; *E. I. duPont & Co.*, 311 NLRB 893, 894 (1993).

Respondent argues that the evidence presented by General Counsel is insufficient to meet this definition of in effect a bilateral process. Quoting from *Polaroid*, supra, and *Electromation*, Respondent stresses that "purpose is a matter of what the organization is set up to do and that is shown by what the organization actually does." Id. at 424 fn. 3.

Respondent contends that General Counsel has not adduced any probative evidence of what the committee actually did, since it failed to produce any witnesses who were present during the May 2 meeting, which appears to be the only meeting held by the committee. However, notwithstanding the lack of direct evidence of what went on at that meeting, the record contains more than sufficient evidence of what transpired there, as well as other evidence to conclude, which I do, that the committee was set-up to "deal" with Respondent under the Board's definition detailed above.

Indeed, when Badalamenti announced formation of the committee to the employees, he told them that it would "represent" the drivers and act as liaison between drivers and management. The committee would then meet with Respondent, go over problems that drivers have, and "try to reach a reasonable conclusion." This description of the committee function clearly contemplates a bilateral mechanism wherein employees make proposals and management responds by acceptance or rejection.

Further, the evidence discloses that after the May 2 meeting of the committee, it decided to distribute questionnaires to drivers, asking for their concerns. In that connection, committee members told drivers that the committee intended to present the drivers concerns, as expressed through the questionnaires to Berkman. That is precisely what the committee did, in its June 7 letter to Berkman, wherein it made several demands upon Respondent, such as a 50 cents per hour wage increase, reimplementation of 401-k and medical benefits, and an agreement to keep secure all existing benefits. The letter adds that the "committee wants to reach a reasonable agreement so we can move forward and become a more productive group."

This letter alone is more than sufficient, in and of itself to establish the purpose of the committee. Respondent stresses the significance of Berkman's reply of June 12, wherein Respondent refused to deal any longer with the committee, because of the Union's charges, I find this reliance misplaced. The fact that Respondent, because of the Union's charges and advice from legal counsel, declined to respond to the committee's demands or to continue to deal with it is irrelevant. Further it has no bearing whatsoever on the purpose of the committee. In fact a careful reading of Berkman's response, makes it crystal clear what was intended by the committee. Thus the letter blames the Union for denying Respondent the opportunity of "responding in a productive manner to the issues you have raised," and for taking away "any chance I had to make amends, without the Union in the picture, and to act quickly to restore your faith in me and your Company." The letter adds further that the committee had been formed by employees to "work with management to solve their problems," and proposes that the Union agree to an election, so employees can choose between being represented by the Union or the committee. The above evidence cannot be more clear as to what was intended by Respondent as the purpose of the committee.

Accordingly, I conclude that the committee is a labor organization within the meaning of Section 2(5) of the Act.

The issue now turns to whether Respondent dominated the formation or administration of the committee. There can be no doubt whatsoever that Respondent's conduct meets the definition of domination. That is an organization that is the creation of management, whose structure and function are essentially determined by management, and whose continued existence depends upon the fiat of management. *EFCO Co.*, supra at 376–377; *Electromation*, supra at 995. Here Respondent announced the formation of the committee at mandatory meetings, determined the structure of the committee, including the number of members, solicited volunteers for the committee, issued a memo requesting additional employees to participate, held the election, counted the ballots signed the official tally of ballots, and announced the results to the employees in a memo wherein it thanked everyone for participating in the process. Based on the above circumstances, I conclude that Respondent dominated the committee in violation of Section 8(a)(1) and (2) of the Act. *EFCO*, supra; *Electromation*, supra.

6. The termination of Mercho

In assessing the legality of Respondent's termination of Mercho, it must first be determined whether General Counsel has established that a motivating factor in Respondent's decision, was the union or protected activity of Mercho. *Wright Line*, 251 NLRB 1083 (1980). Once General Counsel has met that burden of proof, the burden shifts to Respondent to prove by a preponderance of the evidence, that it would have taken the same action absent his protected conduct. *Wright Line*, supra; *NLRB v. Transportation Management*, 462 U.S. 393 (1983).

Here I conclude that General Counsel has presented compelling evidence that a motivating factor in Respondent's decision to terminate Mercho was his union activities.

Respondent vigorously argues that it had no knowledge of Mercho's union activities, based on the testimony of Williams and Badalamenti. However, I have credited Mercho's testimony that he signed a card for the Union on April 23, and the next day asked Williams if he (Williams) was interested in signing a card to support the Union, and told Williams that he (Mercho) had signed such a card. Therefore, since Williams is admittedly a supervisor and agent of Respondent, his knowledge of Mercho's union activity is imputed to Respondent. *Woodlands Health Center*, 325 NLRB 351, 361 (1998); *Ready Mixed Concrete Co. v. NLRB*, 81 F. 3d 1546, 1552 (10th Cir. 1996), affg. 317 NLRB 1140, 1143–1144 (1995). Moreover, I find it highly likely that Williams would have informed Badalamenti about his conversation with Mercho. Thus, Williams admitted that he told Badalamenti that he had gone to the Union meeting, and had been asked to leave, so I find it probable that he also informed Badalamenti about his discussion with Mercho about the Union.

The termination of Mercho occurred within a week of the conversation between Mercho and Williams, and a few days before the scheduled union meeting of May 4, of which I have found Badalamenti was aware.[11] This "astonishing timing" provides substantial evidence of antiunion motivation. *Fiber Products*, 314 NLRB 1169, 1186 (1994); *Trader Horn of New Jersey*, 316 NLRB 194, 198 (1995). Indeed, "timing alone may suggest antiunion animus as a motivating factor in an employer action." *Cell Agricultural Mfg. Co.*, 311 NLRB 1228, 1232 (1993); *Sawyer of NAPA*, 300 NLRB 131, 150 (1990).

Respondent argues that Mercho was admittedly not one of the leading organizers, and was not even a member of the organizing committee. However, while true, these facts are not significant. Mercho did sign a card for the Union, this fact became known to Respondent, and shortly thereafter Mercho was terminated. What is also significant in my view is that

[11] In that connection as noted above, I have found that Badalamenti informed Bricker that he knew about the May 4 meeting which I have concluded was violative of Sec. 8(a)(1) of the Act.

Mercho had been one of only two employees to initially sign up for the chauffeurs committee at Badalamenti's meeting of April 24. Thus at the same time that Mercho was signing up for the committee, he was also signing for the Union and attempted to persuade Williams to do the same. Thus I believe that Badalamenti likely viewed Mercho as someone trying to "play both sides of the fence," and someone whom, he could not trust in his campaigning to forestall the Union's campaign by substituting the committee. Therefore, Badalamenti in my judgment felt that Mercho would be someone that he should get rid of, because of his "two-faced" behavior, of supporting the union and the committee. Further, since Badalamenti knew that there was a union meeting scheduled for May 4, what better way could there be to intimidate the employees, then to terminate one of the union's supporters, right before that meeting. Indeed, it was reasonable for Badalamenti to conclude, that Mercho would attend the union meeting and announce his termination, which in fact Mercho did. There can be little doubt that such an announcement by Mercho sent a message to the other employees at the meeting, which I believe Badalamenti intended, that their own continued union support could result in similar action against them.

Moreover, the record contains substantial evidence of Respondent's animus towards the union activities of its employees, in addition to the suspicious timing. I have found above that Respondent committed blatant violations of Section 8(a)(1) and (2) of the Act by dominating and interfering with the affairs of the chauffeurs committee. This action was a clear attempt to persuade employees to abandon their union efforts, and Badalamenti made several statements indicating animus towards the union, including referring to it as "outside forces that would be catastrophic to the company and its employees." Further, Respondent criticized Bricker and Richter for continuing to organize, and not giving Respondent a chance to allow the chauffeurs committee to function. Additionally, I have concluded above that Respondent violated Section 8(a)(1) of the Act, by various other acts, such as the solicitation of grievances, promises and grant of benefits to discourage employees from supporting the Union, creating the impression that their union activities were under surveillance, and coercive interrogation.

Accordingly, the above evidence is more than sufficient to establish a strong link between the discharge of Mercho and his union activities, and that General Counsel has made a strong prima facie showing of discriminatory motivation. Since General Counsel had made such a strong prima facie showing, Respondent's burden of proof with respect to meeting its *Wright Line* is substantial. *Vemco, Inc.*, 304 NLRB 911, 912 (1991); *Eddy Leon Chocolate*, 301 NLRB 887, 889 (1990).

I conclude that Respondent has fallen short of meeting its burden in this regard.

Respondent's witnesses and its documents, advance three reasons for its discharge of Mercho. They are unavailability for work, abusive language to dispatch, and falsely filing for unemployment. I note initially that Respondent had failed to show that it ever discharged any employees, for any of these three reasons. The failure of an employer to show that it has treated employees in the past in a similar manner for engaging in similar misconduct to that of the alleged discriminatee, has been held to be an important defect in the employer's meeting its *Wright Line* burden of proof. *Grand Central Partnership*, 327 NLRB 966, 974 (1999); *Woodlands Health*, supra, at 362; *10 Ellicott Square Corp.*, 320 NLRB 762, 775 (1996), enfd. 104 F.3d 354 (2d Cir. 1996); *New Jersey Bell Telephone*, 308 NLRB 277, 283 (1992). "Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989).

Not only has Respondent failed to show that it has terminated employees for engaging in any of the infractions which allegedly caused it to terminate Mercho, but its treatment of Mercho differed substantially from how it treated other employees, who engaged in similar or worse conduct. Indeed, the evidence demonstrates that at least two of the grounds asserted, unavailability for work and abusive or vulgar language are clearly pretextual. It is notable in that regard that Respondent in its brief, makes no mention of these two grounds at all, thereby implicitly abandoning these grounds as a basis for the discharge. Whether or not such an omission in its brief constitutes an implicit abandonment of these grounds, or at least a realization that these grounds are questionable, I conclude that these two alleged grounds were clearly pretextual.

Thus the assertion that Respondent terminated Mercho for profanity toward a supervisor, is based on Badalamenti's testimony that he considered Mercho's foul language directed toward Segallini to be inappropriate.[12] In that regard, Badalamenti conceded that vulgarity is a regular practice in conversations involving drivers and dispatchers, and that Respondent generally tolerates such behavior. He asserted that there may be a rule "on the books" prohibiting vulgarity, but concedes that such a rule is not enforced.[13]

As noted above, Respondent introduced no evidence of employees terminated for vulgarity or abusive language towards supervisors. To the contrary, Respondent's files revealed significant evidence of disparate treatment. Thus Harris Yakov received two 1-day suspensions for abusive language in January of 2001, the second one of which revealed that he called the dispatcher an "asshole" and a "son of a bitch." Respondent's files included a comment card from the supervisor stating, referring to Yakov, "I will no longer take verbal abuse." Finally, Yakov's file also included a comment card from Segallini, accusing Yakov of always making snide remarks, for which Yakov received no discipline whatsoever. Yakov was not terminated, despite this record, and resigned on March 20, 2001, but with a comment on his termination report, not recommending rehire because he was, "very abusive with co-workers and bad attitude."

Thus the above evidence demonstrates that Respondent treated Yakov, who engaged in much more serious misconduct

[12] Respondent's termination report described the conduct as "abusive language toward dispatcher."

[13] Respondent introduced no evidence of any rule "on the books," prohibiting vulgarity or profanity by drivers.

than Mercho, more leniently, without any providing any explanation or this glaring disparity in treatment. The transcript of the conversation between Mercho and Segallini, shows that although Mercho used the words "bullshit" several times, in regard to comments made by Segallini or to his alleged treatment by Segallini, with Mercho at no time, directed any profanity towards Segallini personally. Contrast that with Yakov, who called a dispatcher an "asshole" and a "son of a bitch," and received only a 1-day suspension, with a prior record of a previous 1-day suspension.

I also find it highly significant that Segallini the dispatcher to whom Mercho directed the allegedly abusive and verbal remarks, did not appear to be bothered by them, nor did he appear to consider such conduct inappropriate. Thus Segallini did not prepare a comment card about the incident, as he did when he complained about Yakov's "snide comments," never complained to Badalamenti about Mercho's alleged "abusive or vulgar language," and never even brought to Badalamenti's attention the conversation, until Badalamenti asked if Mercho was still working for Respondent. The failure of Segallini to prepare a comment card, highlights another problem with Respondent's defense. It appears that Respondent uses a progressive disciplinary system, providing employees with written warnings and suspension, and including comment cards by supervisors, before discharging them.

The above evidence substantially detracts from the validity of Respondent's defense, and leads me to conclude, which I do that Respondent's reliance on Mercho's alleged vulgarity and or abusive language was pretextual. *Stoody Co.*, 312 NLRB 1175, 1183 (1993) (failure to adhere to normal disciplinary procedure); *Marriott Corp.*, 310 NLRB 1152, 1159 (1993) (failure to follow usual pattern of progressive discipline and disparate treatment); *Ferguson Williams, Inc.*, 322 NLRB 695, 703 704 (1995) (vulgarity tolerated in the workplace, employees treated in the past more leniently for more serious misconduct); *Sonoma Mission Inn*, 322 NLRB 898, 905 (1997) (failure to follow normal practice and disparate treatment); *Grand Central Parkway*, supra at 975 (failure to follow normal practice and disparate treatment); *Woodlands*, supra at 363 (treating other employees who engaged in similar or worse conduct more leniently).

Having found this alleged reason for the discharge to be pretextual, it follows that Respondent had not shown that it would have terminated Mercho for this conduct, absent his union activities.

Respondent's second alleged reason for the discharge, his alleged unavailability for work, compels a similar conclusion. As was the case with the alleged vulgarity or abusive language, no one has been shown to have been terminated for such conduct, and the evidence reveals that other employees engaging in similar conduct were treated more leniently, and Respondent did not employ its normal, progressive disciplinary system.

Respondent's files reveal that employee Keith Davis informed Respondent on two different occasions that he would not be available to work first on Sundays, and then on Saturdays. The issue was discussed with Respondent's officials, who permitted Davis to refuse to work on weekends, in part because it might be only a temporary situation. Significantly, no discipline whatsoever was imposed upon Davis for refusing to work on weekends and Davis finally voluntarily resigned his employment after continuing to refuse to work weekends for 10 1/2 months.

Badalamenti testified that the reference to unavailability for work in the termination letter, referred to Mercho's refusal to honor his schedule by failing to work on Sundays. However, Respondent offered no testimony to explain why it tolerated Davis's conduct of refusing to work on weekends, without any discipline at all, and yet it discharged Mercho allegedly for that conduct, without so much as a warning, or even the courtesy of discussing the issue with him, before terminating him.

Similarly, employee David Cooke, according to Respondent's files had not called in for work for over 4 months. Yet, he was not disciplined, but was called into the office for an explanation. He also had filed for unemployment insurance, although he had not been laid off. However, he was not disciplined for any of this conduct, but instead terminated for "job abandonment," and lack of respect shown to supervisors during their meeting.

It is also significant that like the issue of alleged vulgarity or abusive language, it does not appear that Segallini, the dispatcher was disturbed about the alleged unavailability for work that Badalamenti asserts motivated him to discharge Mercho. Once again, Segallini did not file a comment card about this conduct, did not complain about it to Badalamenti, and only brought to his attention the tape, when Badalamenti asked if Mercho was still working there. Accordingly, I conclude that Segallini was not disturbed about Mercho's alleged unavailability, or his refusal to work on Sundays. Indeed a close examination of the transcript reveals that Mercho, although claiming that he had another job on Sunday, because he wasn't getting enough work from Respondent, told Segallini, that it was not a permanent situation and if Respondent got busy, he would be available.

Accordingly, the disparate treatment accorded Mercho is striking and unexplained by Respondent. Two other employees were permitted to be unavailable on weekends or generally, and were not disciplined at all over a period of several months. Yet Mercho was discharged, for a first offense, absent a complaint from the supervisor, without a warning, and where Mercho indicated that his unavailability would be temporary, pending more frequent assignments by Respondent on Sundays.

The failure to bring this matter to Mercho's attention or even to ask him for an explanation, is another substantial defect in Respondent's defense. It is well established that the failure to conduct an adequate investigation and the failure to afford the employee an opportunity to explain or respond to allegations of misconduct are significant indications of discriminatory intent and substantially undermines Employers' *Wright Line* defenses. *Government Employees (IBPO)*, 327 NLRB 676, 700–701 (1999); *New Orleans Cold Storage*, 326 NLRB 1471, 1477 (1998); *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Grand Central*, supra at 976. Such conduct by the Employer shows that it was not truly interested in determining whether misconduct had actually occurred. *Handicabs, Inc.*, 318 NLRB 890, 897 (1995); enfd. 95 F.3d 681, 685 (8th Cir.

1996); *Clinton Foods 4 Less*, 288 NLRB 597, 598 (1988); *Grand Central*, supra.

Here, Badalamenti terminated Mercho, allegedly because of his assertion on the tape that he no longer would be available on Sundays. However, he never discussed the issue with Mercho, never expressed any dissatisfaction with Mercho's decision, never told him that his job could be in jeopardy because of it, and never asked him if the decision was temporary. This conduct of Badalamenti is simply inexplicable, particularly where as I have observed above, the tape itself indicated that Mercho's alleged unavailability on Sundays would be temporary and would end, if Respondent provided him more frequent and or more lucrative assignments on Sundays. Indeed, had Badalamenti called Mercho into his office for an explanation Mercho would have informed him, that contrary to what Mercho had told Segallini, Mercho did not have another job on Sundays.

The failure of Badalamenti to speak to Mercho about the issue is even more damaging, in light of the fact, as detailed above, that when Respondent had a problem with the availability of employee Cooke, he was called into the office to explain why he had not called in for work, for over 4 months. Similarly, when Davis told Respondent of his weekend unavailability, the matter was discussed with Davis, and Respondent agreed to a weekday schedule with a statement that the issue would be revisited in a couple of months. In fact Respondent never revisited the issue, and permitted Davis to continue not working on weekends, until he quit over 10 months later.

The above facts demonstrate that Respondent was not interested in finding out about Mercho's availability, and that Badalamenti did not truly consider his alleged unavailability as a grounds for discharge. Instead, I conclude that Badalamenti simply seized upon Mercho's statement on the tape about his job on Sunday, as a pretext to justify his decision to terminate Mercho, because of his union activities. Therefore, once again Respondent has failed to meet its *Wright Line* burden of proof, that it would have terminated Mercho absent his protected conduct.

I now turn to the final reason asserted by Respondent, Mercho's conduct of filing a false unemployment claim. This does appear to be the primary reason that Respondent contends motivated its decision, particularly since Respondent's brief relied solely on this reason, conveniently ignoring the other reasons asserted at trial. It is of course no surprise that Respondent chose to rely on the latter reason, since it is on the surface the strongest, and was not difficult to discern that I would conclude, as I have, that the other two reasons asserted by Badalamenti and in Respondent's documents, were pretextual. Nonetheless, the fact that Respondent did raise these two pretextual grounds for discharging Mercho, in Badalamenti's testimony, and in Respondent's termination report, tends to shed light on and diminish the validity of its other, somewhat more substantial defense.

Nonetheless, and even apart from the pretextual nature of the other two grounds asserted, I conclude that Respondent has failed to meet its burden of proof, that it would have terminated Mercho, absent his union activities, or put another way, solely for his conduct in filing a false unemployment claim. In some circumstances, I would conclude that the filing of a false unemployment claim would be a sufficiently compelling reason to terminate an employee, and that the *Wright Line* burden of proof would be met. However, the issue is not whether I or the Board consider this conduct sufficiently serious to justify discharge, but whether this Respondent so believed, and whether Respondent would have terminated Mercho because of such misconduct, even though it was partially motivated by his union activities and the union meeting scheduled to be held shortly before his discharge.

The problems with Respondent meeting its burden of proof with respect to this ground are similar to some of the reasons that I have found the other two reasons pretextual. Once again, Respondent's treatment of prior employees who engaged in similar conduct, its failure to conduct an investigation of Mercho's alleged false filing, and the failure to afford Mercho the opportunity to explain his conduct, severely damages Respondent's defense and its attempt to meet its *Wright Line* burden of proof.

As related above, when it discovered that David Cooke had filed for unemployment, although he was not even temporarily laid off, Cooke was called into the office to explain his conduct. Although Cooke's only explanation was that "he did not remember," Cooke received no discipline for this conduct. While he was terminated, the discharge was for job abandonment and his conduct at the meeting with supervisors, and not because of his filing for unemployment when he had not been laid off. Thus this evidence reveals significant evidence of disparate treatment, since Cooke received no discipline for engaging in similar misconduct. Moreover, in contrast to Mercho, Cooke was given the opportunity to explain his conduct. Further, Respondent failed to contact the Department of Labor or to conduct any investigation to determine if in fact, Mercho had intentionally filed a false claim. It may be that Mercho, if provided the chance would have said, as he testified here, that he believed that he was merely filing for partial unemployment, as he did after September 11, when he and others collected, while receiving reduced work assignments from Respondent. Whether Respondent would have accepted that explanation, or whether that explanation was accurate is beside the point.

What is significant, is that Respondent seized on the opportunity to get rid of a known union adherent, right before a union meeting that it was aware of without even attempting to ascertain whether Mercho had in fact intentionally filed a false or fraudulent claim.[14]

Furthermore, Badalamenti's testimony that another related reason for Respondent's decision, that Mercho's case was similar to the prior case involving employee Barry Debowsky, was not convincing. In that regard Badalamenti testified that the cases were similar, and that his attorney, Martin Goldman, allegedly told Badalamenti that Mercho should be fired, because the cases were parallel. However, a close examination of

[14] It is of course true that Mercho did not report his April earnings to the Department of Labor, until after the trial commenced, which tends to cast doubt on Mercho's testimony on this issue. However, Respondent was not aware of this fact at the time of discharge, so it had no bearing on the lawfulness of the termination.

the two cases reveal significant differences between them, and no explanation by Respondent why Debowsky's case either required or even suggested Mercho should be terminated as well. Although Debowsky had filed an unemployment claim, while still employed by Respondent, the similarities in the two cases ended there. In Debowsky's case, unlike Mercho, Respondent contested the unemployment claim, and took the position that Debowsky had not been laid off, but had abandoned his job. Respondent here never contested Mercho's unemployment claim, even after it discharged him. Indeed, Respondent provided no explanation why it could not have simply contested Mercho's claim, as it did Debowsky's, rather than firing him. Therefore, Debowsky's case, rather than supporting Respondent's decision vis à vis Mercho, instead provides further evidence of disparate treatment. It also shows that Respondent cared very little about Mercho filing a false or fraudulent claim for unemployment, for if it did, it certainly would have contested his claim, and notified the Department of Labor that Mercho had not been laid off on April 1, as his form indicated.

Furthermore, Badalamenti's testimony that both he and his attorney felt that the cases of Mercho and Debowsky were so similar that Respondent must or should terminate Mercho, makes little sense, and was not explained or explicated by Respondent. As noted above, Respondent has not taken consistent positions in these cases, since it did not terminate Debowsky, but merely contested his unemployment, claiming that he had abandoned his job. Since that proceeding was over, and Respondent was not successful in its position in that respect, it is hard to understand why Respondent might have believed that it was necessary to terminate Mercho, to maintain some possibly consistent position. While there was and still is a lawsuit pending against Respondent by Debowsky, concerning alleged back wages, Respondent provided no explanation or testimony, as to how that unrelated case could be impacted by Respondent's treatment of Mercho.

This defect in Respondent's defense is more glaring, by the fact that it failed to call Goldman as a witness, to corroborate Badalamenti's testimony, and or to explain the alleged connection between the two cases and the discharge decision. After all, according to Badalamenti, Goldman allegedly told him, after listening to the tape, "You probably gotta let him go. It's too much like Debowsky." The failure of Respondent to call Goldman to explain why he would make such a statement, substantially undermines Badalamenti's testimony and Respondent's defense. Thus "where a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987). In these circumstances, since Goldman is clearly a witness favorably disposed to Respondent, and has knowledge of significant facts, it is appropriate to draw an inference that his testimony would not have corroborated Badalamenti. *United Parcel Service*, 321 NLRB 300 fn. 1 (1996); *Ready Mixed Concrete*, 317 NLRB 1140, 1143 fn. 16 (1995); *Basin Frozen Foods*; 307 NLRB 1406, 1417 (1992).

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent failed to establish that it would have terminated Mercho, absent his protected, union activities. Therefore, Respondent has violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Music Express East Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Local 805, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Music Express Chauffeurs Committee (Chauffeurs Committee) is a labor organization within the meaning of Section 2(5) of the Act.

4. By coercively interrogating its employees concerning their activities on behalf of the Union, soliciting grievances with an implied promise of benefit, promising and granting its employees benefits in order to discourage them from supporting the Union, and creating the impression that their union activities were under surveillance, Respondent has violated Section 8(a)(1) of the Act.

5. By dominating and interfering with the formation and administration of, and rending unlawful assistance and support to the Chauffeurs Committee, Respondent has violated Section 8(a)(1) and (2) of the Act.

6. By terminating the employment of its employee Emad Mercho, because of his activities on behalf of and in support of the Union, Respondent had violated Section 8(a)(1) and (3) of the Act.

7. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent had violated Section 8(a)(1) of the Act.

8. Respondent has not violated the Act in any other manner alleged in the complaint.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1), (2), and (3) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action.

I shall recommend that Respondent withdraw all recognition from and disestablish the Chauffeurs Committee, and refrain from recognizing it, or any successor thereto, as a representative of any of its employees for the purpose of dealing with Respondent concerning wages, grievances, rates of pay or other conditions of employment.

The normal remedy for the unlawful discharge of Mercho, would be backpay and reinstatement. However, Respondent argues that Mercho's backpay should be tolled and reinstatement denied, because of the "after acquired evidence," that it uncovered during the course of the instant hearing, which established that Mercho engaged in "insurance fraud."

In that regard, Respondent relies on the testimony of Department of Labor Representative Smith, and the documents

submitted, which establish that Mercho's filed for unemployment while listing his last date worked for Respondent on April 1, and that Mercho did not report his April earnings with Respondent to the Department of Labor, until after learning during the instant trial, that Respondent had uncovered evidence of his having collected full benefits for this period of time.

Based on the above evidence, Respondent asserts that it has established that Respondent would have terminated Mercho in any event, based on its knowledge of this "after acquired evidence" on September 9, and that his backpay should be tolled and reinstatement denied as of that date. I do not agree.

The main problem with Respondent's assertion, is its total failure to adduce any testimony or other evidence that this "after acquired evidence" would have had any impact on its decision. Thus while Badalamenti testified at length about Respondent's decision and his discussion with his attorney, he made no mention of the "after acquired evidence," even though such evidence had recently come to Respondent's attention. In the absence of such testimony, or any other evidence, that could establish that Respondent would have terminated Mercho if it had known of this evidence, Respondent's contention must be dismissed, and normal reinstatement and backpay remedies be ordered.

Moreover, the evidence in the record, even apart from this crucial omission in Respondent's evidence, indicates to the contrary, that even had it known about the alleged fraud, it still has not shown it would have discharged Mercho.

Thus the alleged new evidence is not substantially different from what Respondent knew or at lease suspected prior to the discharge. Respondent knew, or at least believed, that Mercho had filed for unemployment, while still employed by Respondent. Thus the "new evidence" only confirmed that fact, plus establishing that Mercho in fact received benefits for a period of time while he was still employed by Respondent. However, Respondent could have assumed that Mercho intended to collect, when he filed, so the new evidence is not all that significant. More importantly, the evidence discloses that Respondent cared little about any alleged "insurance fraud," since it did not discharge two other employees for this conduct.[15] Further, it never even bothered to contest Mercho's "fraudulent" claim, or otherwise notify the Department of Labor that Mercho had filed a false claim.

In these circumstances Respondent had fallen far short of establishing that it would have terminated Mercho, if it had known about the alleged "fraud," and I shall order him reinstated with backpay. Backpay shall be computed with interest in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

[15] Debowsky, whose unemployment it contested, and Cooke, who was fired for other reasons.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Music Express East Inc., Elmwood Park, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their activities on behalf of or support for International Brotherhood of Teamsters Local 805 (AFL–CIO) (the Union).

(b) Soliciting grievances from employees and implying that such grievances will be adjusted in order to discourage employees from supporting the Union.

(c) Promising and granting its employees restoration of 1-hour preparation pay, increased supervision by management of dispatchers' conduct towards employees, and other benefits and improvements in their terms and conditions of employment, in order to discourage its employees from supporting the Union.

(d) Creating the impression amongst its employees, that their activities on behalf of the Union were under surveillance.

(e) Forming, dominating administering or contributing support to the Music Express Chauffeurs Committee (the Chauffeurs Committee) or any other labor organization.

(f) Telling employees that it intends to form such labor organization or suggesting or encouraging employees to form, participate in or cooperate with the Chauffeurs Committee concerning terms and conditions of employment.

(g) Discharging and thereafter refusing to reinstate its employees because of their activities on behalf of or support for the Union.

(h) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately withdraw all recognition from and completely disestablish the Chauffeurs Committee and refrain from recognizing the Chauffeurs Committee, or any successor thereof as representative of its employees for the purposes of dealing with Respondent concerning wages, grievances, rates of pay, or other conditions of employment.

(b) Within 14 days from the date of this Order, offer Emad Mercho immediate and full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order remove from its files any reference to the discharge of Emad Mercho and within 3 days thereafter notify him in writing that this has been done and that evidence of the discharge will not be used as a basis for any future action against him.

(d) Preserve and, within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Elmwood Park, New Jersey facility, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representatives, shall be posted by Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in this proceeding, Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by Respondent as any time since April 17, 2002.

(f) Within 21 days after service by the Region file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that all violations alleged in the complaint but not found are dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf of or support for International Brotherhood of Teamsters, Local 805 (AFL–CIO) (the Union).

WE WILL NOT solicit grievances from our employees and imply that such grievances will be adjusted in order to discourage employees from supporting the Union.

WE WILL NOT promise or grant our employees restoration of 1-hour preparation pay, increased supervision by us of dispatchers' conduct towards employees, or other benefits and improvement in their terms and conditions of employment, in order to discourage our employees from supporting the Union.

WE WILL NOT create the impression amongst our employees, that their activities on behalf of the Union are under surveillance by us.

WE WILL NOT form, dominate, administer or contribute support to the Music Express Chauffeurs Committee (the Chauffeurs Committee) or any other labor organization.

WE WILL NOT tell our employees that we intend to form such labor organization or suggest or encourage our employees to form, participate in or cooperate with the Chauffeurs Committee concerning terms and conditions of employment.

WE WILL NOT discharge and thereafter refuse to reinstate our employees because of their activities on behalf of or support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees, in the exercise of their rights under Section 7 of the Act.

WE WILL immediately withdraw all recognition from and completely disestablish the Chauffeurs Committee and refrain from recognizing the Chauffeurs Committee, or any successor thereof as representative of our employees for the purposes of dealing with us concerning wages, grievances, rates of pay or other conditions of employment.

WE WILL within 14 days from the date of the Board's Order offer Emad Mercho immediate and full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Emad Mercho, and with 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

MUSIC EXPRESS EAST INC.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."